



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Native Resource Development, Inc.

File: B-246597.2, B-246597.3

Date: July 13, 1992

M. Joyce Geyser, Esq., and Randall S. Yavitz, Esq., Sacks, Tierney & Kasen, for the protester.
James P. O'Sullivan, Esq., and John R. Jefferies, Esq., Fennemore Craig, for Navajo Transport Services, Inc., an interested party.
James F. Trickett, Department of Health and Human Services, for the agency.
Behn Miller Moe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency failed to notify protester in writing that its agency-level protest was received is dismissed since there is no requirement that agencies provide such acknowledgement to a protesting party.
2. Protest filed after bid opening that solicitation failed to include required Buy Indian Act clause is dismissed as untimely since alleged improprieties apparent from the face of a solicitation must be filed prior to bid opening.
3. Protest that agency failed to resolve agency-level protest in a timely manner is dismissed as untimely where protester failed to raise this argument within 10 working days of receiving notice of agency's projected decision date.
4. Protest that awardee is not a valid Buy Indian Act concern is dismissed as untimely where filed more than 10 working days after protester received denial of this ground of its agency-level protest.
5. Protest that awardee submitted a nonresponsive bid is dismissed as untimely where this challenge was not raised until more than 5 months after the protester knew the contents of the allegedly nonresponsive portion of the awardee's bid.

6. Protest that awardee's bid expired prior to contract award is denied where record shows that agency-level protest tolled the expiration of awardee's bid acceptance period.

7. Protest that agency's affirmative determination of awardee's responsibility was made in bad faith is dismissed where protester fails to provide any evidence to support this allegation.

8. Protest that agency improperly awarded contract prior to resolution of protest is dismissed since Competition in Contracting Act does not require an agency to withhold award unless the protest was filed within 10 calendar days of award.

DECISION

Native Resource Development, Inc. (NRD) protests the award of a contract to Navajo Transport Services, Inc. (NTS) under invitation for bids (IFB) No. S92-0016/JT, issued by the Navajo Area Office of the Indian Health Service (IHS), Department of Health and Human Services (HHS), for ground transportation services for Navajo Indians requiring kidney dialysis treatment at IHS dialysis centers located in Arizona and New Mexico.

We dismiss the protest in part and deny it in part.

BACKGROUND

The solicitation was issued on September 24, 1991, as a total set-aside for 51 percent "Buy Indian" concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988), and contemplated the award of a firm, fixed-price requirements contract for a base year and 2 option years. Under the terms of the IFB, the successful awardee was required to drive Navajo Indians back and forth between their residences and selected IHS dialysis centers; in this regard, the solicitation stated that the successful awardee would provide up to 150,000 miles of ground transportation services per year. The IFB's pricing schedule contained a separate contract line item for each year of the prospective contract and required bidders to submit both a unit and total price for each of these three line items. With regard to contract award, the IFB contained the provision set forth at Federal Acquisition Regulation (FAR) § 52.217-5, which provides that the government would evaluate bids for award by adding the total price for the base requirement to the total price for all options.

At the October 29 bid opening, the agency received three bids; the results were as follows:

NTS	\$576,000
NRD	720,000
Safe Ride Services, Inc. ¹	720,000

By letter dated November 6--prior to any award determination--NTS filed a protest with the contracting officer, arguing that it was the only bidder eligible for award.² On November 8, NRD also filed a protest with the contracting officer, challenging any award to NTS as improper. In its agency-level protest, NRD argued that NTS was not a qualified Buy Indian concern, and that the company was nonresponsible. NRD also protested the solicitation's failure to include a standard Buy Indian provision.

By letter dated November 13, the contracting officer notified both NTS and NRD that each firm had filed agency-level protests challenging the other's Buy Indian eligibility; the contracting officer further advised both firms to provide any rebuttal comments on these agency-level protests within 3 working days. By letter dated November 14, the contract specialist issued an additional request for responsibility-related documentation from each firm.³ By correspondence dated November 20 and November 25, NTS and NRD separately responded with comments and the requested documentation.

¹In its bid, Safe Ride Services indicated that it is not an Indian-owned firm; accordingly, by letter dated November 14, the contracting officer rejected its bid as nonresponsive.

²On November 7, NTS filed a protest with this Office which reiterated its agency-level protest grounds; however, by letter dated November 13, NTS withdrew this protest, stating that it preferred to have the matter resolved at the agency level by the contracting officer.

³Specifically, the contract specialist asked each firm to provide: (1) copies of all contractual agreements with organizations that also provide ground transportation services; (2) an itemized list of the vehicles that would be used to perform this contract; (3) a copy of each vehicle's title; (4) a copy of each firm's automobile insurance; and (5) copies of all federal, state, and local licenses required to operate as a commercial business.

By memorandum dated January 24, 1992, the IHS Director⁴ asked the IHS contracting officer and contract specialist to obtain additional documentation from NTS regarding the operation and control of its company; after receiving the contract specialist's request--dated January 28--NTS provided the requested documentation to the agency on January 31.

On February 28, NRD received a decision from the IHS Director denying its challenge to NTS' Buy Indian eligibility. On March 9, NRD hand-delivered a supplemental agency-level protest to the contracting officer which alleged that NTS was no longer eligible for award since--according to NRD--the NTS bid was both nonresponsive and had expired. On March 11, NRD received a decision from the contracting officer--dated February 27--denying the remaining portion of its initial agency-level protest. By letter dated March 13, the contracting officer further informed NRD that its March 9 supplemental protest would not be considered since it was untimely filed. On March 20, NRD filed this protest with our Office, which--in addition to reiterating its agency-level protest grounds--alleges that the agency improperly delayed resolving NRD's agency-level protest.

DISCUSSION

Failure to Acknowledge Receipt of NRD Agency-Level Protest

In its protest to this Office, NRD first contends that the agency improperly failed to notify NRD in writing that its November 8 agency-level protest had been received. This argument does not constitute a valid basis of protest since there is no requirement that the agency provide the protester with such written notice. In any event, we fail to see how NRD was prejudiced by this lack of notification since the record demonstrates that the agency promptly proceeded to investigate NRD's November 8 protest, as evidenced by the contracting officer's November 14 notification to NTS that a protest regarding its Buy Indian eligibility had been filed by NRD.

⁴Under HHS regulations, the IHS Director has sole authority for resolving challenges regarding a contractor's eligibility under the Buy Indian Act.

Solicitation's Failure to Include Buy Indian Notice Clause

According to NPD, an IHS internal policy memorandum requires all agency Buy Indian set-aside solicitations to include the following provision:

"Any firm that misrepresents itself as an Indian-preference eligible firm in order to secure the award of a contract or purchase order shall be subject to suspension, debarment, and prosecution under the False Claims and Major Fraud Act."

Because the IFB did not include this provision, NRD alleges that the solicitation was defective.

This challenge is untimely. Our Bid Protest Regulations require protests based on apparent solicitation defects--such as Buy Indian procurement provision--to be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1992). Since NRD failed to protest this alleged defect prior to the October 29 bid opening, this protest ground is untimely.⁵

Timing of Agency's Resolution of NRD's Protest

NRD argues that the agency failed to resolve NRD's agency-level protest in a timely manner.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), a protest based on other than an apparent solicitation impropriety must be filed within 10 working days after the protester knows or should know the protest basis. Here, the record shows that by letter dated January 23, the contracting officer asked NRD to extend its bid acceptance period through February 29 "[d]ue to an extensive legal review of subject solicitation and resulting protests." This letter placed NRD on notice that the agency did not anticipate resolving NRD's agency-level protest before February 29; to be timely, NRD should have raised any objections to the agency's decision-making time frame within 10 working days of receiving the contracting officer's January 23 letter. Since NRD waited almost 2 months before questioning the

⁵In a supplemental protest filed with our Office on March 24, NRD contends that without this provision, bidders were not adequately on notice that this solicitation was set aside for Buy Indian firms. We see no merit in this argument since both the solicitation cover page and Section M--"Evaluation Factors for Award"--advised bidders that the IFB was set aside for Indian firms.

timing of the agency's resolution process, this protest ground is untimely.⁶

NTS' Buy Indian Act Eligibility

NRD also protests that NTS is not a valid Buy Indian concern. This argument is untimely.

Our Bid Protest Regulations require that where a protest initially has been filed with a contracting activity, any subsequent protest to the General Accounting Office, to be considered timely, must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the agency-level protest. 4 C.F.R. § 21.2(a)(3).

As noted above, by letter dated February 20, the IHS Director informed NRD that he had determined NTS to be a valid Buy Indian concern. This February 20 correspondence constituted the initial adverse agency action on NRD's challenge to NTS' Buy Indian eligibility; in this regard, the IHS Director specifically advised NRD that:

"In accordance with current [IHS] Buy Indian policy, the Director . . . is the official responsible for the resolution of challenges regarding eligibility under the Buy Indian Act. Therefore, I am responding to that part of your protest regarding the eligibility of [NTS] as a Buy Indian enterprise. The other issues raised in your protest will be responded to by the . . . Contracting Officer."

By NRD's own account, it received the IHS Director's denial letter on February 28; accordingly, to timely challenge NTS' Buy Indian eligibility, NRD had to protest the Buy Indian eligibility determination within 10 working days of that date. Since it did not challenge the February 20 determination by March 13--the 10th working day after its February 28 receipt of the letter--its subsequent protest to this Office

⁶Moreover, we do not find any hint of impropriety in the amount of time which the agency devoted to resolving NRD's protest. NRD raised several complex issues in its protest--pertaining to NTS' Buy Indian eligibility and responsibility--which required extensive investigation. In this regard, the record shows that three separate document requests as well as a site visit were necessary to confirm NTS' Buy Indian eligibility and responsibility.

regarding NTS' Buy Indian eligibility is untimely.⁷ Terry & Sons, Inc.--Recon., B-242014.2, Feb. 4, 1991, 91-1 CPD ¶ 115.

Responsiveness of NTS' Bid

In its bid, NTS inserted a hand-written notation on the pricing schedule which offered an alternate bid price in the event that the agency decided to make multiple awards under the IFB. In its protest to this Office, NRD argues that the hand-written notation renders NTS' bid nonresponsive. We will not consider this argument.

The record shows that at the October 29 bid opening--which NRD and NTS attended--the contracting officer publicly questioned NTS about this notation and then informed NTS that this alternate bid notation would not be considered since--according to the contracting officer--the solicitation required award to be made on an "all or none" basis. The contracting officer then completed Standard Form 1409, "Abstract of Offers," and indicated in the "Remarks" section of the form that the NTS bid was "all or none." On this form, the contracting officer also inserted both the "all or none" as well as the alternate multiple-award price which NTS had proposed. The contracting officer then asked NTS and NRD to sign the abstract form; both NRD and NTS received a copy of this bid abstract at the bid opening.

As noted above, our timeliness rules require that protests concerning other than alleged solicitation defects be filed in 10 working days from when the basis of protest is first known; in this regard, a protester's receipt of oral information forming the basis of its protest is sufficient to start the 10-day time period running--written notification

⁷In its comments on the agency report, NRD argues that despite its untimeliness, we should consider its protest against NTS' Buy Indian eligibility pursuant to the significant issue exception to our timeliness rules as provided by 4 C.F.R. § 21.12(a). The significant issue exception is strictly construed and sparingly used to prevent the timeliness rules from becoming meaningless; we will invoke it where the protest raises an issue of first impression that would be of widespread interest to the procurement community or where the matter has not been considered on the merits in prior decisions. Correa Enters., Inc.--Recon., B-241912.2, July 9, 1991, 91-2 CPD ¶ 35. The matters raised by NRD regarding NTS' Buy Indian eligibility have been addressed in previous cases. See Calvin Corp., B-245768, Jan. 22, 1992, 92-1 CPD ¶ 98; Northwest Piping, Inc., B-232644, Jan. 23, 1989, 89-1 CPD ¶ 53.

is not required. Mirada Assocs.--Recon., B-246376.2, Jan. 2, 1992, 92-1 CPD ¶ 12. Clearly, based on the contracting officer's public bid opening discussion as well as its receipt of the bid abstract form which set forth all the data pertaining to the NTS hand-written bid notation, NRD knew its grounds for challenging the NTS bid as nonresponsive on October 31. To be timely, NRD should have protested that the hand-written notation rendered the NTS bid nonresponsive within 10 working days of the bid opening date; since NRD did not raise this ground of protest until almost 5 months later, this argument is untimely.

NTS' Bid Acceptance Period

The cover page of the solicitation, Standard Form 33, set forth the following bid acceptance clause:

"[T]he undersigned agrees, if this offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items . . . specified in the schedule."

NRD left this clause blank, thereby offering a 60-day bid acceptance period. NTS, however, entered a 15-day period.

On October 31, 2 days after bid opening on October 29, NTS voluntarily extended its bid acceptance period to the requested 60 days. Later, in response to the contracting officer's January 23 request, NTS again extended its bid acceptance period through February 29.

In its protest to this Office, NRD argues that NTS cannot receive contract award because its bid expired 15 days after the October 29 bid opening date. In this regard, NRD contends that any apparent bid extensions executed by NTS are improper and of no legal effect.⁸

Although the standard acceptance period clause gives bidders the option to state a time different from the 60-day period, we view it as essentially a request for a 60-day acceptance period. Lane Blueprint Co., B-216520, Oct. 23, 1984, 84-2 CPD ¶ 454. Where, as here, the IFB does not contain a mandatory bid acceptance period, a bidder is free to offer a period shorter than the one requested and still be considered responsive to the solicitation. Brener Bidg. Maint. Co., Inc., B-219862, Oct. 28, 1985, 85-2 CPD ¶ 475.

⁸We consider this protest to be timely filed since it was received within 10 working days of the March 6 contract award date.

However, where a bidder offers a bid acceptance period less than that requested in the solicitation, that bidder cannot be allowed to extend that period, either before or after its expiration, where other bidders offered the longer requested acceptance period. Triac Assocs., Inc., B-214612, Mar. 26, 1984, 84-1 CPD ¶ 351. The reason for this rule is that the bidder offering a shorter acceptance period than that requested in the solicitation has not assumed as great a risk of price or market fluctuations as have the bidders that offered the requested acceptance period; thus, allowing the bidder to decide, subject to its own particular interest, whether it desires to extend the bid or let it expire would be prejudicial to the bidders who offered the requested acceptance period and who therefore are bound by their bid prices for the entire period.⁹ American Truss & Mfg. Corp.; Dillin's Wood Prods., Inc., B-205962 et al., May 18, 1982, 82-1 CPD ¶ 477.

As noted above, the record shows that NRD offered the requested 60-day bid acceptance period in its bid. Since the NRD bid remained available for award, NTS should not have been permitted to extend its bid beyond the original 15 days. Accordingly, the attempts to extend NTS' bid were of no legal effect since such extensions would have afforded the firm an unfair advantage over NRD. Mid Atlantic Label, Inc., B-234120, Mar. 31, 1989, 89-1 CPD ¶ 338. The only question for our consideration therefore is whether the NTS bid did in fact expire prior to the March 6 award date.

NTS contends that NRD's November 8 agency-level protest tolled the running of NTS' bid acceptance period and therefore its bid did not expire prior to award. We agree.

Generally, a party's active participation in a bid protest tolls its bid acceptance period until the protest is resolved. Mission Van & Storage Co., Inc. and MAPAC, Inc., a Joint Venture, 53 Comp. Gen. 775 (1974), 74-1 CPD ¶ 195. In such instances, no prejudice inures to the other bidders since a potential awardee still bears the risk that the contracting agency, in the absence of a protest, will be unable to make award within the potential awardee's shorter-than-requested bid acceptance period. Werres Corp., B-211870, Aug. 23, 1983, 83-2 CPD ¶ 243. Further, tolling the acceptance period for the duration of the protest in which the potential awardee actively participates prevents other bidders, foreseeing otherwise the likelihood of an award to the potential awardee, from frustrating the award,

⁹Because of the risk of prejudice to other bidders, the fact that the contracting officer requested the second bid extension is of no legal effect. Introl Corp., B-206012, Feb. 24, 1982, 82-1 CPD ¶ 164.

and thus circumventing the requirement of an award to the lowest, responsible, responsive bidder, by filing a frivolous protest and maintaining it until the potential awardee's acceptance period had expired. Id.

On November 8, the 10th day of NTS' bid acceptance period, NRD filed its agency-level protest against the NTS bid. On March 5, the agency's Regional Counsel approved the contracting officer's decision denying the protest; accordingly, on that date--for purposes of calculating the tolled bid acceptance period--the NRD protest was resolved and the bid acceptance period once again began to run.¹⁰ The 15th and final day of the NTS bid acceptance period therefore fell on March 10; since contract award was made on March 6--4 days prior to the scheduled March 10 expiration date--the award to NTS was proper.

Affirmative Determination of Responsibility

Prior to issuing the instant solicitation, the agency obtained these transportation services under three blanket purchase agreements (BPA) with NRD, NTS, and Safe Ride Services.¹¹ NRD claims that when it first approached the agency about securing one of these agreements, the contracting officer informed NRD that as a newly formed corporation, NRD could not be considered for a BPA because of the company's lack of experience.

¹⁰Although the contracting officer's decision was dated February 27, it did not become final--and was not released for distribution to the protester--until the agency's Protest Control Office and Regional Counsel approved the denial on March 5. For purposes of calculating the tolled bid acceptance period, we consider the date that the decision became the final agency position to constitute the date of protest resolution. See Welres Corp., supra (agency's receipt of notice from this Office that protest has been resolved ends the tolling of a bid acceptance period).

¹¹A BPA is a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply. See Federal Acquisition Regulation (FAR) § 13.201. A BPA constitutes one of several small purchase procedures which are exempt from the general Competition in Contracting Act (CICA) requirements for full and open competition; under these procedures, agencies are only required to obtain competition to the maximum extent practicable. See FAR § 13.103; Service Contractors, B-243236, July 12, 1991, 91-2 CPD ¶ 49.

Relying on this prior episode, NRD now claims that the agency's current affirmative determination of NTS' responsibility was made in bad faith.¹² Specifically, NRD claims that the agency could not reasonably determine NTS to be responsible since, as a newly formed corporation, NTS is less experienced than NRD; in this regard, NRD asserts that NTS was determined responsible simply because the IHS contracting office does not want to award a contract to NRD because it is a woman-owned firm.

Our Office will not consider an affirmative determination of responsibility, which is largely a business judgment, unless the protester shows possible fraud or bad faith on the part of procurement officials, or that the solicitation contains definitive responsibility criteria that allegedly have not been met. 4 C.F.R. § 21.3(m)(5). Where, as here, a protester asserts that procurement officials have made an affirmative determination of responsibility in bad faith, the protester must submit evidence that the contracting officials had an intent to harm the protester, since contracting officials are presumed to act in good faith. Oliver Prods. Co., B-245762.2, Apr. 28, 1992, 92-1 CPD ¶ ____.

We find no showing of bad faith here. Despite the agency's initial refusal to deal with NRD, by the protester's own account, the agency subsequently entered into a 6-month BPA with NRD from April through September of 1991; accordingly, we fail to see how the initial refusal to enter into a BPA with NRD demonstrates any agency bias against the protester or women-owned firms.

In sum, the only evidence which NRD has presented to substantiate its bad faith claim is the fact that NTS is a newly incorporated firm, owned and operated by men. Mere allegations of possible impropriety, unaccompanied by supporting evidence, amount to speculation--and do not provide a basis for protest. Sierra Tech. and Resources, Inc., B-243777.3, May 19, 1992, 92-1 CPD ¶ 450. Accordingly, we will not consider NRD's protest against NTS' responsibility. See BWC Technologies, Inc., B-242734.2, Oct. 29, 1991, 91-2 CPD ¶ 386.

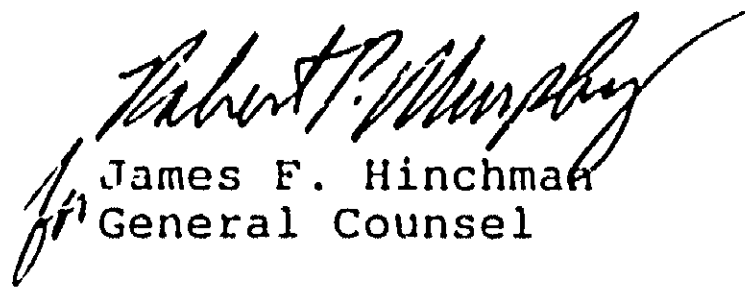
Agency Refusal to Suspend Contract Performance

In its comments on the agency report, NRD also protests that IHS failed to suspend contract performance, as required by

¹²Based on the documentation submitted by NTS--which was identical to the type of substantiating documentation submitted by NRD--the contracting officer executed an affirmative determination of NTS' responsibility on February 11.

CICA, 31 U.S.C. § 3553(d)(1) (1988). However, under CICA and our Bid Protest Regulations, a contracting agency is only required to suspend contract performance if it is notified of a protest filed with our Office within 10 calendar days of a contract award. 31 U.S.C. § 3553(d)(1); 4 C.F.R. § 21.4(b). In this case, NRD's protest to this Office was filed on March 20--14 calendar days after the March 6 award date. Accordingly, IHS was not required to suspend NTS' performance of the contract. See T-L-T Babcock, Inc., B-244423, Sept. 13, 1991, 91-2 CPD ¶ 242.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel